Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1051

(2)

IN THE

Supreme Court of the United States

October Term, 1988

EDWARD DENNIS JACKS, JR.,

Petitioner,

vs.

JACK DUCKWORTH, Superintendent,
Indiana State Prison, and
INDIANA ATTORNEY GENERAL

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, on a successive habeas corpus petition, Jacks was entitled to a redetermination of the merits of his claim concerning the admission into evidence of his request for an attorney during police questioning where the Seventh Circuit had previously determined that any error in the evidentiary use of the attorney request amounted to harmless error in the particular circumstances and where there had been no intervening change in the law regarding such harmless error determination.

2. Whether, on a successive habeas corpus petition, Jacks was entitled to a redetermination of the merits of his claim concerning certain instructions which were given at trial where the Seventh Circuit had previously rejected Jacks' claim that the instructions impermissibly shifted the burden of proof on intent issues and where there had been no intervening change of law affecting this determination.

TABLE OF CONTENTS

Page:

Questions Presented for Review i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statement of the Case

I. Nature of the Case 2

II. Course of Proceedings Below 3

III. Statement of the Facts 4

Reasons for Disallowance of the Writ 7

A. Attorney Request Issue 7

B. Instruction Issue 10

Conclusion 12

TABLE OF AUTHORITIES

Cases:	*Pages:*
Connecticut v. Johnson, 103 S.Ct. 969 (1983)	10
Cupp v. Naughten, 414 U.S. 141 (1973)	11
Doyle v. Ohio, 96 S.Ct. 2240 (1976)	8
Francis v. Franklin, 471 U.S. 307 (1985)	10, 11
Jacks v. Duckworth, 102 S.Ct. 1010 (1982)	3
Jacks v. Duckworth, 102 S.Ct. 2262 (1982)	3
Jacks v. Duckworth, 486 F.Supp. 1366 (N.D. Ind. 1980)	3
Jacks v. Duckworth, 651 F.2d 480 (7th Cir. 1981), *Rehearing and Rehearing En Banc denied* August 14, 1981, certiorari denied 454 U.S. 1147 (1982)	3, 7, 10, 11
Jacks v. State, 394 N.E.2d 166 (Ind. 1979)	3, 7
Kuhlman v. Wilson, 106 S.Ct. 2616 (1986)	8
Sanders v. United States, 373 U.S. 1 (1963)	8
Sandstrom v. Montana, 442 U.S. 510 (1979)	10
Wainwright v. Greenfield, 474 U.S. 284 (1986)	7, 8, 9
Wainwright v. Sykes, 433 U.S. 72 (1977)	7
Rules:	
Rule 9(b), Rules Governing 2254 Actions in the United States District Court	3, 8

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Respondents, Jack R. Duckworth, and Indiana Attorney General, respectfully pray this Court deny issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"), thereby refusing to review the decision entered by that Court in Cause Number 87-1327 on September 13, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana, entered on September 26, 1979, is reported at 394 N.E.2d 166.

The memorandum and order of the United States District Court for the Northern District of Indiana, South Bend, Division (hereinafter "District Court"), Cause Number S79-308, is reported at 486 F.Supp. 1366.

The opinion of the Seventh Circuit on Jacks' first habeas corpus appeal, is reported at 651 F.2d 480 (1981). The denial of certiorari regarding the Seventh Circuit's opinion in 1981 is reported at 102 S.Ct. 1010 (1982), and the denial of a request to file a petition for rehearing in this Court is reported at 102 S.Ct. 2262 (1982).

The Memorandum and Order of the District Court in Cause Number S86-460, which was the second successive habeas corpus petition and the petition culminating in Jacks' present request for review by this Court, appears as Appendix C to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (hereinafter "Petition").

The Opinion of the Seventh Circuit, which is the subject of Jacks' request for review, is reported at 857 F.2d 394 and appears as Appendix A to the Petition.

JURISDICTION

The Respondents accept the Jurisdictional Statement of the Petitioner.

STATEMENT OF THE CASE

I.

Nature of the Case

The Petition arises from the affirmance of a judgment and decision of the District Court denying a second successive petition for a writ of habeas corpus filed by Edward Dennis Jacks, Jr., a person in state custody. Petitioner alleges that the Seventh Circuit erred in failing to redetermine its findings that the evidentiary use of petitioner's request for an attorney during police questioning was harmless beyond a reasonable doubt and that certain instructions did not impermissibly shift the burden of proof on intent issues.

II.

COURSE OF PROCEEDINGS BELOW

Petitioner, Edward Dennis Jacks, Jr., is a state prisoner who is presently incarcerated at the Indiana State Prison pursuant to his conviction for the first degree murder of his wife. Petitioner Jacks was found guilty following a jury trial in November, 1976, and was sentenced to life imprisonment. Jacks appealed his conviction to the Indiana Supreme Court raising the claims that are again the subject matter of this proceeding. The Indiana Supreme Court affirmed Jacks' murder conviction in September, 1979, and denied rehearing in November, 1979. *See Jacks v. State*, 394 N.E.2d 166 (Ind. 1979). Shortly thereafter, the Petitioner sought a writ of habeas corpus from the District Court raising, among other issues, the very same claims that he is seeking to raise for a second and even third time here. In a published opinion, dated April 11, 1980, the District Court rejected Jacks' claims on the merits and accordingly denied a writ. *Jacks v. Duckworth*, 486 F.Supp. 1366 (N.D. Ind. 1980). Jacks appealed the denial of his petition, and the Seventh Circuit affirmed the decision of the District Court, specifically finding that Jacks had not been deprived of his constitutional rights as a result of the evidentiary use of any of his comments to the police or the giving of the instructions in question here to the state criminal trial jury. *Jacks v. Duckworth*, 651 F.2d 480 (7th Cir. 1981), *Rehearing and Rehearing En Banc denied* August 14, 1981. Petitioner Jacks sought a writ of certiorari. This Court, however, denied certiorari on January 11, 1982, and also denied Jacks' request to file a petition for rehearing on May 17, 1982. *Jacks v. Duckworth*, 102. S.Ct. 1010 (1982); *Jacks v. Duckworth*, 102, S.Ct. 2262 (1982).

Jacks' previous efforts at relief did not end in 1982, however. On June 17, 1983, Jacks again filed a petition for writ of habeas corpus (No. S83-271), attempting to relitigate the instruction issue because of an alleged change of law. In the Memorandum and Order, dated November 28, 1983, the District Court determined that the petition was a successive petition under Rule

9(b), Rules Governing § 2254 Actions in the United States District Courts, and denied relief on that basis. A certificate of probable cause to appeal was denied twice by the District Court (on December 16, 1983 and December 30, 1983), and the Seventh Circuit also denied a certificate of probable cause for an appeal on March 29, 1984.

In his latest habeas petition, which was filed before the District Court on August 13, 1986, Jacks sought to raise three (3) issues which were previously fully litigated and determined against him. This time around, Jacks raised the issues, as follows:

> 1. Whether a statement made by petitioner, drawing attention to his request for counsel, violated his constitutional rights.
>
> 2. Whether a statement by petitioner drawing attention to the exercise of his right to remain silient violated his constitutional rights.
>
> 3. Whether jury instructions deprived petitioner of a fair trial in violation of constitutional due process guarantees.

There is no dispute here that these issues were not new in any way. As noted above, Jacks previously claimed that his Sixth and Fifth Amendment rights were violated by the playing to the jury of a statement by Jacks to Sergeant Miller that "as regards to what happened this evening, I want to talk to my attorney." A review of Jacks issues and related material unquestionably demonstrate that they present the identical legal and factual issues previously litigated. Similarly, Jacks' present complaint concerning Court's Instruction No. 13 and State's Instruction No. 5 are the identical complaint, raising the same legal and factual matters, which was decided against Jacks in two separate proceedings.

Following a Response to the Order to Show Cause, other briefing and filing of the state record, the District Court issued its Memorandum and Order on January 22, 1987, and Judgment on January 23, 1987, denying a writ of habeas corpus.

Jacks filed his Notice of Appeal, and the District Court granted a certificate of probable cause, allowing an appeal, on February 26, 1987.

On the appeal, the Seventh Circuit determined that there was no basis for redetermining the merits of Jacks' claims because there had been no change of law vitiating the previous decision of that court.

III.

STATEMENT OF THE FACTS

Throughout this Brief, the Record of the Proceedings in the state courts will be cited as "R".

Jacks came home from a trip to Georgia and was told by his wife, Kathy, that she had filed for divorce. (R. 685). Kathy took their children to an apartment she had rented. (R. 685). On August 28, 1975, the day after Petitioner returned from his trip, Kathy went back to her home, where Petitioner was staying. (R. 373). Kathy took Pat Munson along with her, and Pat telephoned Jacks to tell him that they were coming. (R. 374). Kathy, her children and Pat drove to Petitioner's house, and Kathy went up to the door. (R. 381-382). Jacks opened the door with an assault rifle in his hands and shot Kathy. (R. 382). When Petitioner turned the rifle toward Pat, she ran for her car. (R. 383). Petitioner shot one of Pat's tires out and then pointed the rifle at her windshield, as she backed her car out of the driveway. (R. 384). Kathy died as a result of the shooting. (R. 411, 568).

At the trial, in addition to Pat Munson, the State called a number of witnesses who observed Petitioner near the time of the shooting. Mark Miller and Harvey Miller, two ambulance attendants (R. 393, 400) arrived at the scene after the shooting (R. 393) and testified as to several commments made by Petitioner indicative of his sanity. (R. 395-396, 398, 401). Officer Snyder arrived at the scene, shortly after the shooting, and called for an ambulance. (R. 418). He heard Petitioner tell the

firemen not to touch his wife as they were not doctors, but Snyder told him that she had to go to the hospital. (R. 418-419). He and Petitioner went inside, and Petitioner made a phone call. (R. 421). Jammed cartridges were found at the scene. (R. 464-465).

Barbara Best, Jacks' neighbor, heard Petitioner tell her dad before the shooting that when the policemen came to serve papers there might be trouble. (R. 485). She went to the scene after the shooting. (R. 486-487). Ronnie Greenawalt, who knew Jacks, testified as to his contacts with Petitioner before the shooting. Jane Yoder, Jacks' neighbor, testified that Petitioner, before the shooting, asked her to keep her kids away. (R. 520). Petitioner said he might blow his wife's head off and said his parents were flying down to restrain him. (R. 520). Ted Cover, another neighbor, noticed that Petitioner was relatively calm just after the shooting. (R. 532).

Petitioner told two officers, Bousson and Sharon, that the shooting had been accidental. (R. 539, 545). Officer Bousson heard Jacks on the telephone explaining that he was in trouble and needed help. (R. 538). Later, at the booking room of the police station, Petitioner told Officer Linton: "I shot my wife" and "I want to know how she is." (R. 548).

Kathryn Brown, an EEG technologist who was involved in pretrial testing of Jacks relating to his insanity defense, testified that Petitioner told her he was back for a second test because " . . . his attorney had wanted to 'go the insanity route,' and he didn't want to go along with that." (R. 822).

Dr. Urruti and Dr. Westfall examined Petitioner as to his mental condition and testified at trial that in their opinions he was sane and could form the requisite intent at the time of the crime. (R. 798-804, 851-856).

During the trial, a tape of a conversation between Officer Miller and Petitioner was played to the jury. (R. 592-596). Prior to trial, Petitioner had moved to suppress this tape, and a hearing was held. (R. 342-362). Additional discussion occurred

at trial, and the trial judge granted the motion to suppress, in part. (R. 554-555). Throughout proceedings below, the Petitioner has only objected to the playing of the final comment he made on the part of the tape allowed into evidence at trial.

Petitioner objected to the giving of State's Instruction No. 5 at trial but did not object to the giving of Court's Instruction No. 13. (R. 906, 908-909). The Supreme Court of Indiana specifically determined that Petitioner waived any issue with respect to Court's Instruction No. 13 by failing to make a contemporaneous objection as required by Indiana procedural rules. *Jacks v. State*, 394 N.E.2d 166, 173 (Ind. 1979). The Petitioner, throughout the proceedings in the federal courts below, has made no effort to show the requisite cause and prejudice to avoid the waiver determination. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

REASONS FOR DISALLOWANCE OF THE WRIT

No Substantial Question for Review of Jacks' Second Successive Habeas Corpus Petition has been presented because the basis for previous decisions of the federal courts regarding Jacks' claims have not been affected by subsequent decisions of this Court.

A. Attorney Request Issue

Most of Jacks' argument in his certiorari petition focuses upon this Court's decision in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), which was decided after the original decision of the Seventh Circuit. *See Jacks v. Duckworth*, 651 F.2d 480, 488-90 (7th Cir. 1981), *cert denied*, 454 U.S. 1147 (1982). Jacks' argument fails to appreciate the fact that the Seventh Circuit's original decision had two bases. While it is correct that *Wainwright v. Greenfield* vitiated the Seventh Circuit's position that a person's post-*Miranda* warning request for counsel soon after the commission of the crime was admissible to show the defendants' sanity at the time of the crime, this Court's decision in *Wainwright v. Greenfield* did not affect or in anyway vitiate

the Seventh Circuit's determination that any error in the evidentiary use of the attorney request had been harmless beyond a reasonable doubt. Contrary to Jacks' claim (at p. 13 of the Petition), the Seventh Circuit's "harmless error" determination is not at odds with *Wainwright v. Greenfield* or the other Court of Appeals decisions which he cites (at pp. 18-19 of his Petition).

Wainwright v. Greenfield certainly did not prohibit a harmless error rationale for affirming a conviction even if the kind of problem discussed in that case or *Doyle v. Ohio*, 96 S.Ct. 2240 (1976) occurred. *Id.*, 106 S.Ct., at 640-641, footnote 13. What Jacks wishes to obfuscate is that there has been no change of law concerning such harmless error determinations. Rule 9(b), Rules Governing § 2254 Actions in the United States District Courts relevantly provides, as follows:

> (b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . .

The District Court and the Seventh Circuit certainly had discretion to deny Jacks' demand that the attorney request issue be reconsidered since the harmless error determination had not been affected by *Wainwright v. Greenfield*. Jacks has not shown that the "ends of justice" would be served by re-examination of the attorney request claim since there has been no change of law or fact affecting the previous determination. *See Kuhlman v. Wilson*, 106 S.Ct. 2616 (1986); *Sanders v. United States*, 373 U.S. 1 (1963). There is just no reason for this Court to mandate reconsideration of the attorney request issue.

The reasoning utilized by the Seventh Circuit concerning this matter is certainly sound. Contrary to Jacks' assertion that the Seventh Circuit has misunderstood the meaning of *Wainwright v. Greenfield*, the circuit court's most recent decision in Jacks' case demonstrates not only understanding but proper application of *Wainwright v. Greenfield*. For example, the Seventh Circuit observed that "[u]nder *Wainwright*, there is no doubt that the admission of Jacks' statement that '[a]s regards

whatever happened this evening, I want to talk to my attorney,' constituted a due process violation." Petition App. 13. While recognizing that *Wainwright v. Greenfield* constituted an intervening change of law, the Seventh Circuit also quite properly recognized that this intervening change of law did not affect the validity of Jacks' conviction because of the harmless error determination. (Petition App. 13).

It was appropriate for the Seventh Circuit to rely on its harmless error determination. Indeed, the Circuit Court did not merely rely upon its previous harmless error determination but stated that even if it were appropriate to revisit the harmless error analysis, their conclusion would be the same. Petition App. 14. The Seventh Circuit observed that:

> The admission into evidence of the challenged statement was harmless beyond a reasonable doubt. See *Fencl v. Abrahamson*, 841 F.2d 760 (7th Cir. 1988). Jacks' statement that "[a]s regards whatever happened this evening, I want to talk to my attorney," was simply one of many lucid statements made by Jacks in the portion of the taped conversation admitted into evidence. In addition, the prosecutor did not dwell on this statement in closing argument but rather mentioned the statement along with all the other statements made in the admitted portions of taped conversation. More important, the taped conversation was simply a small portion of a large amount of evidence going to the issue of Jacks' sanity. The State presented the testimony of eleven lay witnesses that indicated that Jacks was sane before, during, and after the shooting. Two experts testified that in their opinions, Jacks was sane and capable of forming the requisite criminal intent at the time of the shooting. An electroencephalogram technologist testified that, upon his return for a second electroencephalogram, Jacks told her that the first test did not show his insanity as his counsel had hoped and that he did not want to go along with an insanity defense. To counter the State's case, Jacks presented a considerable amount of probative evidence designed to show he was insane at the time of the shooting, including his own testimony and the testimony of two experts who

> testified that, in their opinions, Jacks was incapable of forming the requisite criminal intent. Jacks also argued that much of the State's evidence reinforced this conclusion. In short, the challenged statement was a small part of a taped conversation which was in turn a small part of the entire evidence on the issue of insanity. While it was error to admit the statement, its admission was harmless error.

(Petition App. 14-15).

There is simply no substantial basis for this Court to review the Seventh Circuit's harmless error determination.

B. Instruction Issue

In the original decision of the Seventh Circuit, it was determined that the instructions given at Jacks' criminal trial did not impermissibly shift the burden of proof on intent issues to the defense. *See Jacks v. Duckworth*, *supra*, 651 F.2d at 485-487. This was the primary basis for rejecting Jacks' instruction claim. Consequently, when Jacks attempted to relitigate the instruction issue in 1983, based upon comments in *Connecticut v. Johnson*, 103 S.Ct. 969 (1983) concerning harmless error, the District Court dismissed the successive petition, and the Seventh Circuit denied a certificate of probable cause because any comment concerning harmless error in the original decision of the Seventh Circuit had merely been an alternative rationale for denying a writ on the instruction issue. Contrary to any such contention by Jacks, *Connecticut v. Johnson* certainly did not amount to an intervening change in the law warranting relitigation of the instruction claim.

Similarly, the Seventh Circuit correctly determined that *Francis v. Franklin*, 471 U.S. 307 (1985) did not amount to an intervening change of law warranting reconsideration of the instruction issue. *See* Petition App. 15-19. This Court made it clear in *Francis v. Franklin* that no significant change in the law was represented by that case. This Court in *Francis v. Franklin* followed principles which had previously been articulated in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and princi-

ples applied by the Seventh Circuit in its initial opinion in Jacks' case. *Jacks v. Duckworth*, *supra*, 651 F.2d at 485-487. As observed by the Seventh Circuit in its most recent Jacks' opinion, *Francis v. Franklin*, following the *Sandstrom* precedent, concluded that a certain set of instructions " . . . violated due process because they created a mandatory rebuttable presumption on the issue of intent that shifted the burden of persuasion on the intent issue to the defendant", citing *Francis*, 471 U.S. at 318. *See* Petition App. 15-16.

After pointing out that this Court in *Francis v. Franklin* did not deviate from *Sandstrom* or principles in *Cupp v. Naughten*, 414 U.S. 141 (1973) (which held that particular instructions must be examined in the context of all the instructions given to the jury), the Seventh Circuit reiterated its holding in its original decision in Jacks' case. Rather than reiterate the reasoning of the Seventh Circuit, the Respondent incorporates by reference the comments made by the Seventh Circuit at pages 16 through 19 of its opinion. *See* Petition App. 16-19.

The Seventh Circuit recognized that the instruction condemned in *Francis v. Franklin* used different language than the instructions at issue in Jacks' case. Compare instruction in *Francis*, at 105 S.Ct. 1969-1970 with the instructions given at Jacks' trial. See Petition, pp. 7-8. The instructions in *Francis* were mandatory but rebuttable by the defendant, thereby relieving the prosecution of the burden of proof on the intent issues. 105. S.Ct. 1972-1973. As noted by this Court, "When combined with the immediately preceding mandatory language, the instruction that the presumptions 'may be rebutted' could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted." 105 S.Ct. at 1973. As further noted by the Court:

> The very statement that the presumption "may be rebutted" could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the

> presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the element of intent. (105 S.Ct. at 1974)

The language "may be rebutted", implying a duty to rebut by the defendant presents entirely different qualifying language than in *Jacks*, where the previous decisions have carefully described why the instructions did not shift the burden of persuasion on the intent issues. The Seventh Circuit carefully examined all of the instructions along with those instructions which were challenged by Jacks. There is no substantial reason for this Court to review the decision of the Seventh Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be denied.

Respectfully submitted,

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